IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION, Plaintiff-Respondent, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE, Defendants-Movants.	)	No. 09-_____ (D.C. Nos. 08-1023 & 08-2997 (N.D. Cal.)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR TEMPORARY STAY PENDING DECISION OF SOLICITOR GENERAL REGARDING APPEAL AND IMMEDIATE ADMINISTRATIVE STAY

(ACTION REQUIRED BY OCTOBER 9, 2009)

9th Cir. Rule 27-3 Certificate

1) The telephone numbers and office addresses of the attorneys for the parties are as follows:

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2) As explained in the body of the motion, the district court has ordered the federal government to disclose documents being withheld under Exemptions 3, 5, and 6 of the Freedom of Information Act on October 9, 2009. On the afternoon of October 7, the district court denied a motion by the government to stay the order until November 23 to provide the Solicitor General with time to decide whether to appeal. A stay is required prior to the expiration of the disclosure deadline on October 9. We are requesting a stay until November 8, and an immediate administrative stay pending disposition of this motion.

3) Counsel for the plaintiffs have been notified of the filing of this motion and are being served with the filing by electronic mail.

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INTRODUCTION

The Office of the Director of National Intelligence (ODNI) and the Department of Justice (DOJ) hereby move for an emergency stay of a district court FOIA order that compels the disclosure of information protected by Exemption 3 of FOIA and confidential communications within and between the Executive Branch and Congress regarding revisions to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq*. The order requires the disclosure of these confidential materials, and other sensitive information, on October 9, a mere fifteen days after the entry of the order itself. Because of the importance of the case to the constitutional functions of the political branches, and because of the novelty and complexity of the issues underlying the litigation, the government asked the district court to stay the disclosure order until November 23 to give the Solicitor General the time allotted to her by law to decide whether to appeal.

Despite the significance of the issues, the need for thorough consultation within the Executive Branch and an opportunity for consultation with Congress, and the fact that disclosure of the documents will moot the case, the district court denied the stay motion yesterday, October 7. The government therefore requests this Court to grant a temporary stay to permit the Solicitor General to conduct the necessary consultations and deliberations regarding the appeal decision. Absent such a stay, the confidentiality of the documents will be irretrievably lost and this Court will be

deprived of its ability to review the district court's order.

Although Title 28 gives the Solicitor General until November 23 to decide whether to appeal, she has undertaken to complete her deliberations in this matter by November 8, thirty days from tomorrow. We therefore ask this Court to stay the disclosure order until November 8. Because the disclosure deadline set by the district court is tomorrow, the government further asks for an immediate administrative stay of the order while the Court considers the underlying stay request.

STATEMENT

1. In April 2007, acting on behalf of the President, the Executive Branch submitted draft legislation to Congress to amend the Foreign Intelligence Surveillance Act. The proposed legislation was intended to update FISA to take account of changes in telecommunications technology since FISA's enactment in 1978. In addition, the proposal sought to provide immunity in appropriate circumstances for telecommunications companies that were being sued for alleged participation in certain post-9/11 intelligence gathering activities.

In August 2007, Congress enacted the Protect America Act of 2007 (PAA), which incorporated some but not all of the changes sought by the Executive Branch. The PAA was designed as a temporary measure, and it expired by its own terms in February 2008. Thereafter, in July 2008, Congress passed and the President signed the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA

Amendments Act). Among other things, the Act provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community * * * if the Attorney General certifies" that the alleged assistance falls within specified statutory categories or that the person did not provide the alleged assistance. 50 U.S.C. § 1885a.

Throughout the period preceding the enactment of the FISA Amendments Act, the Executive Branch and Congress engaged in ongoing discussions and negotiations to seek mutually acceptable revisions to FISA, including the enactment of appropriate legislation to protect telecommunications companies from suit for their intelligence gathering assistance. Some of the discussions were conducted in public, but other discussions were conducted through confidential, non-public exchanges between the two branches. Among other things, numerous email messages regarding proposed statutory amendments were exchanged within the Executive Branch and between the Executive Branch and Congress as part of this collaborative lawmaking effort. At the same time, the Executive Branch engaged in legislative discussions with representatives of telecommunications companies regarding the enactment of statutory immunity provisions. At the time of these discussions, the United States had intervened in the pending suits against telecommunications companies and was aligned with the companies in that body of litigation.

2. In December 2007 and April 2008, plaintiff Electronic Freedom Foundation

(EFF) submitted FOIA requests to ODNI and five DOJ components (the Office of the Attorney General, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Information Policy, and the National Security Division). The requests sought, *inter alia*, agency records regarding "briefings, discussions, or other exchanges" that ODNI and DOJ had had with Congressional staff or with "representatives or agents of telecommunications companies" concerning amendments to FISA, including discussions relating to telecommunications company immunity. EFF filed suit against ODNI and DOJ under FOIA to expedite processing of the requests and to compel disclosure of the requested records.

The agencies disclosed certain responsive records, but have withheld a number of records under several FOIA exemptions. The agencies withheld information that could reveal which telecommunications companies had participated in discussions regarding the legislative proposals, including the identities of the individuals who represented the companies in the discussions. The identities of the companies' representatives were withheld under Exemption 3, which protects information "specifically exempted from disclosure by statute"; the agencies relied on several nondisclosure statutes, including 50 U.S.C. § 403-1(i)(1), which requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure. The agencies also invoked Exemption 6, which protects information about individuals whose disclosure "would constitute a clearly

unwarranted invasion of personal privacy."

The agencies also withheld email messages and other records of communications regarding the legislative negotiations that were exchanged between DOJ or ODNI and Congressional staff. The agencies withheld similar communications regarding the negotiations that were exchanged within and between the agencies themselves, between the agencies and the White House, and between the White House and Congress. The agencies also withheld records of communications on the same subject with representatives of telecommunications companies.

These categories of records have been withheld on the basis of Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The agencies contended that the emails within the Executive Branch, and between the Executive Branch and Congressional staff, which were exchanged in the process of inter-branch negotiations over the proposed legislation and assisted the Executive Branch's deliberations regarding those proposals, come within the scope of the deliberative process privilege and the Presidential communications privilege. The agencies contended that their communications with the telecommunications companies regarding the statutory immunity proposals are protected by the attorney work product and common-interest privileges, as well as by the deliberative process and Presidential communications privileges.

In order for records to be withheld under Exemption 5, they must be "inter-agency or intra-agency." *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001). The courts have recognized that a document may qualify as "intra-agency" for purposes of Exemption 5 even if it does not originate within the agency itself. For example, courts have applied Exemption 5 to advice provided to agencies by private consultants, see *id.* at 10-11 (discussing consultant cases), and to other outside parties whose input is solicited to assist an agency in its deliberative processes, including members of Congress and former Presidents. See *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *National Institute of Military Justice* v. *Department of Defense*, 512 F.3d 677 (D.C. Cir. 2008); see also *Judicial Watch, Inc.* v. *Department of Energy*, 412 F.3d 125, 130-31 (D.C. Cir. 2005) (agency deliberative communications with non-agency in Executive Office of the President are protected by Exemption 5).

In this case, the communications between the agencies and Congress were part of a collaborative effort to formulate revisions to FISA that would be acceptable both to the President and to Congress, and the communications themselves were relied on to develop the Executive Branch's positions regarding the appropriate scope and content of the proposed legislation. Given the purpose and role of the communications in the agencies' own deliberations, the agencies have regarded their

communications with Congress as intra-agency documents under the foregoing lines of authority. The communications exchanged *within* the Executive Branch, rather than between the Executive Branch and Congress, satisfy the inter-agency/intra-agency requirement *a fortiori*. And the communications between the agencies and telecommunications companies regarding the immunity provisions of the proposed legislation have been regarded as intra-agency because the government and the companies have a common interest in the defense of the pending litigation and the communications regarding the immunity provisions concerned that common interest.

3. After the agencies processed EFF's requests and provided *Vaughn* indices identifying the withheld documents and the grounds for withholding, the agencies moved for summary judgment and EFF filed a cross-motion for summary judgment. On September 24, 2009, the district court issued a memorandum order (copy attached) denying the agencies' motion and granting EFF's cross-motion.

The district court held that email messages between ODNI or DOJ and Congressional staff do not qualify as "intra-agency" documents and therefore are not protected by Exemption 5. Op. 7-8. The court reached the same conclusion with respect to the communications between the agencies and the telecommunications companies. *Id.* at 8-9. Having held that these documents do not satisfy the intra-agency requirement, the court added that it "need not address the parties' remaining contentions regarding privilege." *Id.* As noted above, the documents being withheld

under Exemption 5 also include materials exchanged *within* the Executive Branch, which are uncontroversially intra-agency (or inter-agency) even under the district court's own reasoning – for example, documents regarding the legislative negotiations that were exchanged within and between ODNI and DOJ. Nevertheless, the court erroneously included those documents as well in the disclosure order.

Turning to the withheld identities of the telecommunications company representatives, the court acknowledged that the identities were being withheld on the basis of Exemption 3, and noted that "documents over which Defendants claimed Exemptions 2 or 3 * * * are no longer at issue here as EFF's challenge [to withholding under those exemptions] has been abandoned." Op. at 9 & n.1. Nevertheless, the court required the identities to be disclosed. The court reasoned that the identities could not be withheld on the basis of Exemption 6, but failed to address the agencies' independent basis for withholding under Exemption 3. *Id.* 9-10.

4. The decision whether to appeal adverse judgments against the federal government is vested in the Solicitor General of the United States. See 28 U.S.C. § 516; 28 C.F.R. 0.20(b). Congress has provided the Solicitor General by statute with sixty days, rather than the thirty days provided for private litigation, to decide whether to appeal an adverse judgment. 28 U.S.C. § 2107(b); see also FRAP 4(a)(1)(B) (same). This additional time reflects Congressional recognition both of the frequent complexity of government litigation and the often-lengthy process involved

in consulting with and obtaining the views of all interested entities within (and, where appropriate, outside) the Executive Branch.

On September 30, the government moved the district court to stay the disclosure order until November 23 to allow the Solicitor General the sixty-day period provided by Title 28 to decide whether to appeal. EFF opposed the stay request. On October 6, the government filed a motion to amend the judgment under Rule 59(e), seeking to correct the district court's error in ordering disclosure of documents exchanged within and between the agencies without addressing whether the documents were privileged, and in ordering disclosure of the representatives' identities without resolving the Exemption 3 issue. On October 7, the district court issued an order (copy attached) denying the stay motion in its entirety and also denying the government leave to seek relief under Rule 59(e). As a result, the agencies are now required to disclose the withheld documents tomorrow, October 9.

ARGUMENT

I. The Disclosure Order Should Be Stayed To Permit the Solicitor General to Make a Considered Decision Regarding Appeal

The district court's refusal to grant the brief stay requested by the government is both remarkable and unsupportable. This case presents novel and significant questions under FOIA, including the extent to which FOIA requires disclosure of confidential communications exchanged between the Executive Branch and Congress

in connection with the legislative process. The case also involves a variety of different categories of documents, each of which requires separate consideration under FOIA. A temporary stay is necessary to give the Solicitor General time to consult with the many components of the federal government that have an interest in these issues and to make a considered decision regarding appeal on the basis of that consultation. If the disclosure order is not stayed, the documents at issue will have to be released, the statutory and constitutional interests underlying the confidentiality of those documents will be irretrievably lost, and this Court's ability to review the district court's decision will be lost as well. Under these circumstances, this Court should preserve the status quo by granting a temporary stay while the Solicitor General proceeds with her appeal decision on an accelerated basis.

1. Appellate courts have the well-settled authority "to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 10 (1942). Moreover, the All-Writs Act, 28 U.S.C. § 1651(a), which authorizes federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," empowers courts of appeals to stay district court orders whose performance would moot the case and thereby divest the appellate court of jurisdiction. In this case, a temporary stay is warranted both to "prevent irreparable injury to the parties"

from "premature enforcement" of a disclosure order that "may later be found to have been wrong," and to preserve this Court's jurisdiction over an appeal of that order.

When the government is subject to an order to disclose non-public information, the denial of a stay pending appellate review of the order effectively "force[s] the government to let the cat out of the bag, without any effective way of recapturing it if the district court's directive [were] ultimately found to be erroneous" by a reviewing court. *Irons* v. *FBI*, 811 F.2d 681, 683 (1st Cir 1987). In this case, EFF is seeking records revealing confidential deliberative communications between the Executive Branch and Congress on highly sensitive policy issues regarding foreign intelligence gathering; similar documents that are wholly internal to the Executive Branch, including the White House itself; confidential communications on the same subject between the government and telecommunications companies; and the identities of the companies' representatives, which not only implicate the individuals' privacy interests but also the fundamental governmental interest in preventing disclosure of intelligence sources and methods. If these records are disclosed, their confidentiality will be instantly forfeited and cannot be recovered at a later point. See, *e.g.*, *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (noting that the "confidentiality [of disclosed records] will be lost for all time").

Moreover, once the records subject to a FOIA request are released, a FOIA action seeking those records is rendered moot. Federal courts simply "have no further

statutory function to perform" under FOIA once "all requested records are surrendered." *Perry* v. *Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) (*per curiam*); see *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in Chambers) (observing that "disclosure would moot that part of the Court of Appeals' decision requiring disclosure" under FOIA); *Bonner* v. *Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.); see also *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002). Accordingly, "[f]ailure to grant a stay will entirely destroy [the government's] right[] to secure meaningful review" by rendering its appeal "moot." *Providence Journal*, 595 F.2d at 890. The need to preserve the government's right to appellate review is "perhaps the most compelling justification" for the grant of a stay in the FOIA context. *John Doe Agency*, 488 U.S. at 1309 (Marshall, J.) (internal quotation marks omitted).

For these reasons, stays pending appeal in FOIA cases are routinely granted by district courts and, if necessary, by courts of appeals. See, *e.g.*, *Senate of State of Cal.* v. *Mosbacher*, 968 F.2d 974 (9th Cir. 1992); *Minnis* v. *USDA*, 737 F.2d 784, 785 (9th Cir. 1984); *Neely* v. *FBI*, 208 F.3d 461, 463 (4th Cir. 2000); *Ferguson* v. *FBI*, 957 F.2d 1059, 1060 (2d Cir. 1992). Indeed, the Supreme Court itself has stayed FOIA disclosure orders pending appeal. See, *e.g.*, *HHS* v. *Alley*, 129 S. Ct. 1667 (2009).

2. In denying the government's motion for a temporary stay to allow an orderly decision regarding appeal, the district court reasoned that the matter has "been

submitted on the parties' cross-motions long enough for the Defendants to consider their options regarding a possible appeal in the event their motion was denied." Stay Denial Order at 2. That statement reflects a profound misunderstanding of the process by which government appeals are authorized.

The decision whether to appeal the district court's disclosure order is not made by "the Defendants" (*id.*), but instead by the Solicitor General herself. One of the reasons why 28 U.S.C. § 2107(b) provides sixty days for government appeal decisions is that the Solicitor General ordinarily has had no involvement in the case prior to the completion of the district court proceedings, and needs adequate time *after* the district court issues its decision to familiarize herself with the issues, consult with interested components, and weigh the many factors bearing on the appeal decision. In this case, the government's summary judgment papers were filed well before the current Solicitor General took office, and she had no involvement in the case whatsoever prior to the issuance of the district court's disclosure order two weeks ago. Since that date, moreover, the Solicitor General has had to deal with numerous equally pressing matters, including presentation of oral argument in the Supreme Court yesterday in *Salazar* v. *Buono*, No. 08-472.

The decisionmaking process in this case is complicated by the variety of documents at issue. As noted above, the withheld documents reveal communications within and between the agencies; communications between the agencies and the

White House; communications between the White House and Congress that are reflected in agency records; communications exchanged between the agencies and Congress; and communications between the Executive Branch and telecommunications companies. All of these documents have been withheld under Exemption 5, but the legal analysis varies from one category to the next, and the Solicitor General must make an independent assessment of the case for appealing each category.

Moreover, the applicability of Exemption 5 to records of confidential negotiations between the Executive Branch and Congress, undertaken in the performance of the two branches' constitutionally assigned roles in the legislative process, is an issue of first impression, which implicates both the statute itself and constitutional considerations that may inform the construction of the statute. *Cf. Public Citizen* v. *U.S. Dept. of Justice*, 491 U.S. 440, 465-67 (1989). The governmental interests involved in that issue extend far beyond the two agencies that are the named defendants in this case. The issue is a matter of obvious significance to the Office of Management and Budget and to the Executive Office of the President. The issue is also of considerable import to Congress, which supported the government's invocation of Exemption 5 in the district court, and which may well wish to be heard by the Solicitor General regarding the appropriateness of appeal. As a result, the consultative process in this case will necessarily be more elaborate than usual.

In short, this is a canonical example of a case in which the Solicitor General

needs a full opportunity to consult and make a considered decision about appeal. A stay until November 8, while shorter than the full sixty-day period contemplated by Title 28, will permit the Solicitor General to complete this process on an accelerated basis. Under these circumstances, the district court's suggestion that a temporary stay is unwarranted because "the Defendants" have already had enough time to consider their appellate options is not only misinformed, but also remarkably cavalier about the legitimate interests of a coordinate branch of government.

The irreparable injury to the government (and to this Court's own review function) that would result from a denial of a temporary stay far outweighs any impact that such a stay might have on EFF. In opposing the stay motion below, EFF suggested that immediate disclosure is imperative because new bills have recently been introduced to repeal the telecommunications carrier immunity provision of FISA. But information about past legislative negotiations by a prior Administration over already-enacted legislation has limited significance for public consideration of new legislative proposals in the current Congress. Moreover, even if it were assumed that the withheld documents would contribute to public understanding of the new bills, it is speculative to think that Congress's consideration of the bills will be completed while the temporary stay is in effect. EFF noted below that certain provisions of FISA require reauthorization before the end of the current year – but the immunity provision is not one of them.

II. The Requirements for a Stay Pending Appeal Are Inapplicable to this Temporary Stay Motion, But Are Met Nevertheless

As explained above, the government is not presently seeking a full-blown stay pending appeal, but rather a temporary stay that will expire within thirty days of the current disclosure deadline. Given the specific purpose and limited scope of such a temporary stay, there is no reason for this request to be judged against the standards for stays pending the court's full consideration of an appeal. Nevertheless, a stay would be warranted here even if the standards for stays pending appeal were applied.

"A party seeking a stay [pending appeal] must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in his favor, and that a stay is in the public interest." *Humane Society of U.S.* v. *Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). As shown by the discussion above, failure to stay the disclosure order will cause irreparable injury to the government, as well as preventing this Court itself from reviewing the order, and the balance of equities and the public interest tilt decisively in the government's favor. At the same time, the arguments previously made to the district court have a substantial prospect of succeeding on the merits, for the reasons stated to the district court.

1. As noted above, the agencies invoked Exemption 3 to withhold records that would reveal the telecommunications companies that communicated with the

government regarding statutory immunity. Federal law requires the government to refrain from disclosing intelligence sources and methods, and knowing which companies were involved in the immunity legislation could permit inferences about which companies had been providing intelligence assistance and the nature of that assistance. In turn, revealing the identities of the persons representing the companies would be tantamount to disclosing the identities of the companies themselves.

The district court nevertheless has ordered the agencies to make the representatives' identities public. It did *not* do so on the basis of a determination that Exemption 3 does not apply. Instead, it ruled that the identities were not protected by Exemption *6*, and ordered the disclosure of the information without ever deciding the Exemption 3 issue at all. See Op. 9-10. Even if the court's Exemption 6 ruling were correct, which is doubtful at best, it was manifest error for the district court to order disclosure of the identities of the companies' representatives, and thus the identities of the companies themselves, without even addressing Exemption 3.

2. The district court's approach to Exemption 5 was equally deficient. As noted above, while the parties dispute whether communications between the Executive Branch and Congress, or between the Executive Branch and telecommunications companies, satisfy the inter-agency/intra-agency requirement of Exemption 5, it is *un*disputed that the government's Exemption 5 withholding also includes documents that are inter-agency or intra-agency even under the district

court's view of the law. As noted above, the order covers not only communications between the agencies and Congress, but records of communications within and between *the agencies themselves*. Similarly, the order covers communications between the agencies and the White House, which are likewise covered by Exemption 5. See, *e.g.*, *Judicial Watch*, 412 F.3d at 130-31. Having noted that many of the documents are emails exchanged with Congress and with telecommunications companies, the court proceeded to order disclosure of *all* of the documents, including those which were exchanged entirely within the Executive Branch. Because those documents are incontestably intra-agency and inter-agency, the district court could not order their disclosure under Exemption 5 without resolving the government's privilege claims – something that the court explicitly declined to do.

3. Although the application of Exemption 5 to records of confidential negotiations between the Executive Branch and Congress is a matter of first impression, there is ample authority for the more general proposition that "documents * * * submitted by non-agencies parties in response to an agency's request for advice * * * are covered by Exemption 5." *National Institute of Military Justice*, 512 F.3d at 681. Here, the agencies sought and received information and advice from Congressional staff about Congress's views on potential legislation and Congress's receptivity to legislative options under consideration by the Executive Branch – information and advice used by the agencies and others in the Executive Branch to

make decisions about the Executive Branch's own legislative positions and proposals. This confidential Congressional input thus played the same kind of role in the agencies' own deliberations as did the input provided by members of Congress in *Ryan* and former Presidents in *Public Citizen*, *supra*.

The district court suggested that the Supreme Court's decision in *Klamath* precludes treating communications from Congressional staff in this case as intra-agency. Op. 7-8. In *Klamath*, the Court declined to treat communications between a federal agency and Indian tribes regarding water rights as intra-agency because, unlike outside consultants, the tribes had independent financial interests in the subject matter of the communications, and those interests were adverse to other claimants. See 532 U.S. at 11-15. But the collaborative relationship between Congress and the Executive Branch in the development of new legislation has no resemblance to the relationship between the agency and the tribes in *Klamath*. In providing the agencies with information and views about legislative options for use in the development of the Executive Branch's own legislative position, Congress was participating in a common effort with the Executive Branch to advance the public interest.

4. The district court also held that the communications between the agencies and telecommunications companies regarding proposed immunity provisions do not qualify as intra-agency documents. The court declined to analogize the telecommunications companies to outside consultants. Op. 8-9. But as the

government repeatedly explained, the agencies were *not* relying on the outside-consultant cases with respect to the telecommunications companies. Instead, they argued that those communications qualify as intra-agency because the agencies and the companies were communicating about their common interests in the ongoing litigation against the companies for their alleged assistance in post-9/11 surveillance. See, *e.g.*, *Hunton & Williams, LLP* v. *Department of Justice*, 2008 WL 906783 at *5 (E.D. Va. Mar. 31, 2008) (holding that if documents exchanged with non-government entity satisfy the requirements of the common-interest privilege, that creates an intra-agency or inter-agency relationship for purposes of Exemption 5). The district court's Exemption 5 analysis simply fails to address, much less answer, this reasoning.

CONCLUSION

For the foregoing reasons, the disclosure order should be stayed until November 8, and an immediate administrative stay should be entered pending disposition of this motion.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE,

Defendants.
/

No. C 08-01023 JSW

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Now before the Court are the parties' consolidated cross-motions for summary judgment. Having considered the parties' pleadings, the relevant legal authority, and having had the benefit of oral argument, the Court hereby DENIES Defendants' motion for summary judgment and GRANTS Plaintiff's cross-motion for summary judgment.

BACKGROUND

On August 5, 2007, President Bush signed into law the Protect America Act of 2007, which amended the Foreign Intelligence Surveillance Act ("FISA") to expand the government's authority to gather intelligence with the help of domestic communications service providers, and to protect telecommunications companies from future legal liability for their role in the surveillance activity. Pub. L. No. 110-55, 121 Stat. 552.

The Protect America Act was set to expire in February 2008 without further congressional action. President Bush indicated that the Administration would push for more extensive, and likely retroactive, legal immunity for the telecommunications companies. The

House of Representatives passed the RESTORE Act of 2007, which would not protect telecommunications carriers from civil liability. H.R. 3773 (as passed by House). On February 21, 2008, however, the Senate passed a version of legislation to amend FISA, which purports to require dismissal of any state or federal lawsuit against a telecommunications carrier for facilitating government surveillance, if the Attorney General certifies to the court that the company was assisting in certain intelligence activity authorized by the President. H.R. 3773, FISA Amendments Act of 2008 (amendment as agreed to by Senate).

This action arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff, the non-profit Electronic Frontier Foundation ("Plaintiff" or "EFF"), seeks the production of a number of withheld documents from the Office of the Director of National Intelligence ("ODNI") and the Department of Justice ("DOJ") concerning efforts of the agencies and the telecommunication industry to push for changes to federal surveillance law, especially to ensure that telecommunications carriers are not held liable for their participation in recent governmental surveillance efforts.

On December 21, 2007, EFF faxed two letter to ODNI and DOJ's Offices of the Attorney General, Legislative Affairs, Legal Policy, Legal Counsel, and National Security Division, requested under FOIA all records from September 1, 2007 to December 21, 2007 concerning "briefing, discussion, or other exchanges" that agency officials

> have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendment to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but it not limited to, all email, appointment calendars, telephone message slips, or other records indicating that such briefings, discussion, or other exchanges took place.

(Complaint in 08-01023 JSW at ¶¶ 18-19.)

In letters sent by facsimile on April 24, 2008, to the same set of agencies, EFF requested under the FOIA all records:

> A. from December 21, 2007 to the present concerning briefings, discussions, or other exchanges any [agency] has had with representatives or agents of telecommunications companies concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities;

> B. from December 21, 2007 to the present concerning briefings, discussions, or other communications from any [agency] official to any member of the Senate or House of Representatives or their staffs;
> C. from December 21, 2007 to the present concerning *any* communications, discussion, or other exchanges regardless of subject that any [agency] official has had with Charlie Black, Wayne Berman, Dan Coats, Tom Donilon, Jamie Gorelick or Brad Berenson; and
> D. from January 1, 2007 to the present that are responsive to the categories above, and have not yet been produced in response to previous EFF FOIA requests.

(Amended Complaint in 08-02997 JSW at ¶¶ 34-35.)

In each of the letters, EFF formally requested that the processing of these requests be expedited because they sought information about which there is an "urgency to inform the public about an actual or alleged [f]ederal [g]overnment activity," and were "made by a person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II), 32 C.F.R. § 1700.12(c)(2) and 28 C.F.R. § 16.5(d)(1)(ii).

When the agencies failed to respond timely to these expedited requests, EFF filed suit on February 20, 2008 and June 17, 2008, respectively, in the two cases before this Court, seeking the immediate release of all improperly withheld documents. The issues in the two cases are identical, with the requests for similar documents in sequential time periods, and have been coordinated for purposes of resolution of the legal questions presented. Plaintiff contends that complete production is critical because the information requested is directly relevant to understanding the agencies' roles in lobbying on behalf of telecommunications providers for legislation designed to compel the dismissal of lawsuits against the telecommunications companies, more than 40 of which are currently consolidated and pending before this district. *In re NSA Telecommunications Records Litigation* (MDL Docket No. 06-1791 VRW).

After this Court granted a preliminary injunction requiring disclosure, Defendants produced a number of documents, some with redactions, as well as a *Vaughn* index and declarations attesting to the exemptions under which the agencies have refused full production. After the start of the new administration under President Obama and his declaration of the importance of transparency in government, Defendants produced a small set of additional documents. Now, upon reviewing the production of released documents and the explanations for Defendants' withholdings, EFF determined not to challenge the adequacy of the agencies'

searches or the withholding of any material under Exemptions 1, 2, 3, or 7(E). (*See* Opp. Br. at 8.) EFF does not challenge the withholding of identifying information about any government of private sector individuals with the exception of those involved with telecommunications companies. Therefore, the only disputed materials remaining relate to the unclassified communications between and among executive agencies, Congress, the White House, and telecommunications companies concerning amendments to FISA, and the identities of individuals associated with the carriers within those communications.

In their motion for summary judgment, Defendants contend that their withholdings of records between ODNI or DOJ officials and Members of Congress or their staffs concerning amendments to FISA are appropriate pursuant to Exemption 5 as "inter-agency or intra-agency memorandums or letters." Defendants also argue that the withheld documents form part of the agency's deliberative process and fall under the presidential communications privilege and the common interests or attorney work product doctrine. Defendants also contend that they have properly withheld identifying information regarding individuals and entities who contacted the government in an effort to protect the telecommunications companies from liability. The Court shall address each argument in turn.

ANALYSIS

A. Legal Standards Applicable to Motions for Summary Judgment.

Summary judgment is proper when the pleadings, discovery, and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.* Inferences drawn

from the facts must be viewed in the light most favorable to the party opposing the motion. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

Summary judgment is the procedural vehicle by which most FOIA cases are resolved. *Harrison v. Executive Office for U.S. Attorneys*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). As is mostly the case in this type of proceeding, "there is rarely any factual dispute ... only a legal dispute over how the law is to be applied to the documents at issue." *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). Ultimately, the threshold issue on a motion for summary judgment is whether the agency's explanations are "full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Weiner v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (citing *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987)).

B. Standards Under FOIA.

FOIA was enacted to create a "judicially enforceable public right to secure government documents." *EPA v. Mink*, 410 U.S. 73, 80 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Hanson v. U.S. Agency for International Development*, 372 F.3d 286, 290 (4th Cir. 2004). Accordingly, nearly every document of a federal agency is available to the public unless it falls within one of the Act's nine enumerated exemptions. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). Given FOIA's goal of broad disclosure, the exemptions are "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 636 (1982); *see also Assembly of the State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (the exemptions are to be "interpreted narrowly"). The nine exemptions are narrowly construed so as not to frustrate FOIA's underlying policy of disclosure and non-secrecy. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Moreover, if only a portion of a record is exempt from disclosure, the agency must disclose the non-exempt portion if it is "reasonably segregable." 5 U.S.C. § 552(b).

Exemption 5 prevents the disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); *see also Sears, Roebuck*, 421 U.S. at 148-49 (noting that "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency," and therefore, "it is reasonable to construe Exemption 5 to exempt those documents ... normally privileged in the civil discovery context.") A document qualifies under Exemption 5 if (1) its source is a government agency, meaning the communication must be "inter-agency or intra-agency" and (2) the document "fall[s] within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 9. Specifically, Exemption 5 has been interpreted to incorporate the attorney-client privilege, the deliberative process privilege, and the presidential communications privilege. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

The district court reviews *de novo* the agency's response to a FOIA request, and the agency bears the burden of showing that a FOIA exemption applies to any withheld documents. 5 U.S.C. § 552(a)(4)(B). The agency may meet its burden by submitting affidavits, declarations, and *Vaughn* indices "identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Weiner*, 943 F.2d at 977. Summary judgment may be granted solely based on these materials when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record not by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). "Specificity is the defining requirement" of these explanatory materials. *Wiener*, 943 F.2d at 979 (citing *King*, 830 F.2d at 219). Summary judgment may not be granted if the agency's justifications are "conclusory, merely reciting statutory language, or ... too vague or sweeping." *King*, 830 F.2d at 224.

C. Defendants Have Improperly Withheld Documents Under Exemption 5.

The parties agree that the "the bulk of the records at issue in this case consists of confidential email messages exchanged between ODNI or DOJ officials and congressional staff in which the parties to the emails discussed, analyzed and negotiated possible amendments to FISA." (Opp. Br. at 2; Reply at 2.) The FOIA defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch (including Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f). Neither Congress nor private corporations fall within the statutory definition of "agency." *See also Dow Jones & Co. v. Dep't of Justice*, 908 F.2d 1006, 1009 (D.C. Cir. 1990) (holding that "Congress simply is not an agency [within the statutory definition].") In addition, the legislative history of Exemption 5 demonstrates that the term "Executive Office of the President" within the statutory definition of "agency" does not include the "President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, at 232 (1974); *see also Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that "FOIA does not render "Executive Office of the President" an agency subject to the Act."). The Court also finds that Exemption 5 does not extend to communications that have been shared with government bodies or private corporations outside an Executive branch agency because these entities are not considered "agencies" within the meaning of FOIA.

Defendants appear to contend that communications between agency officials and non-agency officials where the agency has solicited the communication in an effort to facilitate its own deliberative process, may still fall within the inter-agency or intra-agency exemption. In this regard, Defendants contend that the withheld records meet the threshold requirement of Exemption 5 because they have been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally-conferred capacity other than on behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency. (*See* Opp. Br. at 3, citing *Klamath*, 532 U.S. at 9-10.)

However, in order for the exemption to apply in these circumstances, the records submitted by outside consultants must serve essentially the same role in an agency's process of deliberation as documents prepared by agency personnel might have. *Klamath*, 523 U.S. at 10. However, "the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligation are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 10-11; *see also Dow Jones & Co.*, 908 F.2d at 1009 ("as long as the documents are created for the purpose of aiding the *agency's* deliberative process ... they will be deemed intra-agency documents even when created by non-agency personnel") (emphasis in original); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that documents are properly withheld under Exemption 5 where agency records are submitted by outside consultant as part of the agency's deliberative process and were solicited by the agency). To the extent the withheld materials reflect communications between ODNI and DOJ and members of Congress in an effort to facilitate *Congress'* own deliberative process to craft legislation to reform FISA, these communications do not fall under the exemption as there is no evidence that they were used in an effort to aid any agency in its *own* deliberative process.

Similarly, the Court finds that any withheld communications between representatives of the telecommunications companies and government officials also fail to meet the threshold requirement necessary to claim Exemption 5 protection. Here, the telecommunications companies communicated with the government to ensure that Congress would pass legislation to grant them immunity from legal liability for their participation in the surveillance. Those documents are not protected from disclosure because the companies communicated with the government agencies "with their own ... interests in mind," rather than the agency's interests. *See Klamath*, 532 U.S. at 11. The Court finds that the threshold requirement to fall within the ambit of Exemption 5 is not met under these circumstances. The documents do not constitute inter- or intra-agency memorandums or letters under 5 U.S.C. § 552(b)(5). As they fail to meet the threshold burden of demonstrating protection from disclosure, Defendants may not withhold

those documents from disclosure that were exchanged between ODNI and DOJ officials and congressional staff or those documents regarding communications between representatives of the telecommunications companies and government officials.

Although the Court is not persuaded by Defendants' further arguments on the applicability of the presidential communications privilege, the deliberative process privilege, the common interest privilege, or the attorney work product doctrine, the Court need not address the parties' remaining contentions regarding privilege because the Court finds that Defendants have failed to meet their burden to establish the threshold requirement for exemption. Because the test for exemption is conjunctive, the Court need not reach the applicability of the specific privileges Defendants have asserted. *See, e.g., National Institute of Military Justice v. Dep't of Defense*, 2008 WL 1990366, *1 (D.C. Cir. 2008) (finding that many courts overlook the first step in the exemption analysis); *Klamath*, 532 U.S. at 9, 12 (holding that "the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency'" and "[t]here is no textual justification for draining the first condition of independent vitality.")

D. Defendants Have Improperly Withheld Information Under Exemption 6.

EFF contends that the Defendants improperly withheld records or portions of records reflecting the identities of the carrier employees and their agents pursuant to Exemption 6. Defendants argue that the identities of telecommunications companies' employees and agents were also withheld pursuant to Exemption 3, which EFF no longer challenges.[1] Regardless, Defendants contend that Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The analysis proceeds in two stages: the first stage is fairly minimal and only requires that the information is related to personnel, medical or "similar" information. If so, the Court must determine whether the disclosure would constitute a "a clearly unwarranted invasion of personal privacy" by balancing the public interest in

[1] The Court finds that documents over which Defendants claimed Exemptions 2 or 3, but not Exemption 5 are no longer at issue here as EFF's challenge has been abandoned.

disclosure against the privacy interests of the individuals. *See Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252, 260 (D.C. Cir. 1982). In performing the balance, courts must keep in mind Congress' "dominant objective" to provide full disclosure of agency records. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The Court finds that there is some, although not substantial, privacy interest in the withheld documents indicating the identities of the private individuals and entities who communicated with the ODNI and DOJ in connection with the FISA amendments. However, in the balance, the Court finds that the public interest in an informed citizenry weighs in favor of disclosure. There is a strong public interest in disclosure of the identity of the individuals who contacted the government in an effort to expand the government's authority to gather intelligence and to protect telecommunications companies from legal liability for their role in governmental surveillance activity.

CONCLUSION

Accordingly, the Court DENIES Defendants' motion for summary judgment and GRANTS Plaintiff's cross-motion for summary judgment. The Court orders that the improperly withheld documents shall be disclosed by no later than October 9, 2009.[2]

IT IS SO ORDERED.

Dated: September 24, 2009

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

[2] On his first day in office, President Obama issued a memorandum to the heads of all executive branch departments and agencies regarding the breadth of FOIA. *Memorandum for Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683 (Jan. 21, 2009). It provides, in pertinent part: "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles enshrined in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decision involving FOIA." *Id.* In addition, President Obama directed the Attorney General to issue new guidelines governing FOIA, in an effort to reaffirm "the commitment to accountability and transparency." *Id.* The Court finds its holding is consistent with the President's directive.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE,

Defendants.

No. C 08-01023 JSW
No. C 08-02997 JSW

ORDER DENYING MOTION FOR LIMITED STAY PENDING APPEAL DETERMINATION BY SOLICITOR GENERAL AND DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

_____/

Now before the Court is the motion filed by Defendants for a 60-day stay pending a determination by the Solicitor General whether or not to appeal the decision by this Court granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment dated September 24, 2009 ("Order"). The Court finds the motion suitable for resolution without oral argument. Therefore, the hearing set for October 9, 2009 is HEREBY VACATED. *See* N.D. Civ. L.R. 7-1(b). Also before the Court is Defendants' motion for leave to file a motion for reconsideration.

Having considered the parties' pleadings and the relevant legal authority, the Court DENIES Defendants' motion for a limited stay. Although Federal Rule of Appellate Procedure 4(a)(1)(B) permits the Government up to 60 days to determine whether to file an appeal, the Court is not persuaded that it should exercise its discretion to stay its own order pending "necessary consultations and deliberations to determine whether to appeal" the Court's Order. (Reply at 2.) The disputed documents were the subject of an order granting preliminary injunction dated April 2008, a subsequent delay in order for Defendants to re-evaluate their position subject to the reformed regulations of the Obama Administration, and the matter has been submitted on the parties' cross-motions long enough for the Defendants to consider their options regarding a possible appeal in the event their motion was denied.

A motion for a stay pending appeal would be premature and is not properly before the Court. *See* Fed. R. Civ. P. 62(c). The Court makes no finding as to whether a stay pending appeal would be appropriate. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that the factors regulating the issuance of a stay pending appeal are: "(1) whether the stay applicant has made a strong showing that he is likely to proceed on the merits; (1) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.") Should Defendants decide to appeal the Court's Order and to seek a stay from this Court, they will have to meet this high burden.

Defendants have also filed a motion for leave to file a motion for reconsideration of the Order. A motion for reconsideration may be made on one of three grounds: (1) a material difference in fact or law exists from that which was presented to the Court, which, in the exercise of reasonable diligence, the party applying for reconsideration did not know at the time of the order; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments presented before entry of the order. N.D. Civ. L.R. 7-9(b)(1)-(3). In addition, the moving party may not reargue any written or oral argument previously asserted to the Court. N.D. Civ. L.R. 7-9(c).

There is no material difference or emergence of new law or fact since issuance of the Order and the Court has considered the dispositive legal arguments advanced by Defendants in their original papers. The Court concludes that, upon review of the proffered motion for reconsideration, Defendants reargue points previously asserted to the Court and, in essence, merely express their disagreement with the Court's decision. For these reasons, Defendants' motion for leave to file a motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: October 7, 2009

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2009, I have filed and served the foregoing EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR TEMPORARY STAY PENDING DECISION OF SOLICITOR GENERAL REGARDING APPEAL by causing an original and three copies of the motion to be delivered to the Clerk of the Court by hand, and by causing the motion to be delivered by electronic mail to:

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